

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION  
MINUTES OF THE MEETING, Public Session

Friday, October 6, 2000

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:40 a.m. at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Bill Deaver, Kathleen Makel, Carol Scott and Gordana Swanson were present.

**Item #1. Approval of the Minutes of the September 8, 2000, Commission Meeting.**

The minutes of the September 8, 2000 Commission meeting were distributed to the Commission and made available to the public. Chairman Getman corrected the name "Jim Stevenson" to "Jim Stevens." Commissioner Deaver motioned that the minutes be approved as corrected. Commissioner Swanson seconded the motion. There being no objection, the minutes were approved as corrected.

**Item #2. Public Comment.**

There was no public comment at this time.

**Item #4. Discussion: Compliance with Section 87103's "Reasonably Foreseeable Material Financial Effect" Standard (Conflicts Project, Phase 2/Project C).**

Senior Commission Counsel John W. Wallace explained that he was presenting this item one month early to determine what the Commission wanted staff to present at the November meeting. He asked whether the Commission wanted staff to present language defining foreseeability beyond the definitions in Regulation 18706 and in the *Thorner* opinion, and whether the Commission wanted staff to propose language creating an immunity regulation for public officials.

Mr. Wallace suggested that the Commission further defer consideration of these items until after the regulations already being considered have been adopted and enacted. He explained that staff will have a better understanding of how the new regulations will look by December, when the regulatory amendments will be finalized. Additionally, he recommended that the Commission wait until the regulatory amendments have been implemented over an extended period of time to see if the amendments resolve the issues presented in the two proposals in Project C.

Mr. Wallace noted that he had spoken with Los Angeles City Attorney Anthony S. Alperin, who was concerned about the immunity standard and did not agree that the issue be deferred for twelve months. Staff believed, Mr. Wallace stated, that it may be premature to adopt this type of regulation without knowing how the other regulatory amendments will work.

Chairman Getman stated her concern that a time limit on foreseeability should be enacted, possibly longer than twelve months, beyond which the Commission could determine that a financial effect would not be considered a conflict. She noted that a time

limit would be good from a practical as well as perception points of view and that she saw no down side to the time limit.

Commissioner Scott responded that future instances will depend on the facts of the cases, and that there should be flexibility to determine what is foreseeable under the circumstances instead of setting a time limit. She preferred that the determination be made by the public official, and that the Commission make its decision based on the circumstances. She further explained that it is hard to determine what is reasonably foreseeable without facts.

Commissioner Deaver asked whether there was any other law that would immunize someone for something that may happen in the future.

Mr. Wallace responded that he was not aware of any other laws. He noted that staff may need to present different foreseeability definitions for each type of government decision because a single threshold might not work since each case would have different circumstances. Mr. Alperin's intent in his suggested language, he noted, was to remedy the foreseeability problem by giving immunity. Staff preferred to work through advice letters rather than creating a regulation. If the Commission decided to go forward with immunizing type regulations, he explained, staff would need to explore whether the Commission can delegate, by regulation, the Commission's immunizing power, as well as whether a regulation can provide immunizing protection.

Commissioner Makel clarified that the decision before the Commission was whether to defer the decision, and that she supported deferring the decision.

Commissioner Deaver agreed that the decision should be deferred, noting that he had concerns about granting immunization.

General Counsel Sue Ellen Wooldridge stated that there are things in the law similar to the "standard of care" type of regulation that would be immunizing, and gave examples of those regulations.

Commissioner Scott noted that in the examples presented by Ms. Wooldridge, a sale could be voided, but that the FPPC would not be able to void a decision.

Chairman Getman stated that the *Kunec* case was an example of that.

Assistant General Counsel Luisa Menchaca observed that the Political Reform Act (PRA) allows members of the public to void a decision.

Commissioner Deaver noted that the Enforcement Division has a lot of discretion.

Lance Olson stated that the materiality standards decisions would not have any effect on foreseeability because the proposed amendments will not make a difference with the possible exception of the proposed "public generally" amendments. He stated that advice letters, particularly *Teasley*, effectively remove a profession from participating in any governmental decisions dealing with land use. He stated that he did not have an answer

to the "foreseeability" issue, but he did not think that the proposed amendments would resolve the issue.

Mike Martello, with the City of Mountain View and the League of California Cities, stated that the League of Cities endorsed the staff's approach. He agreed that the time limit issue needed to be dealt with, but he did not know whether a twelve month limit would be the solution. He discussed the *Teasley* advice letter, explaining that a twelve months time limit would have created problems in that case. Mr. Martello stated that the "standard of care" issue should have further discussion. He agreed with staff that both issues should be brought back for further study after the amendments have been finalized.

Chairman Getman suggested that a study session on the "foreseeability" and "standard of care" issues be held later in December or in January to determine whether the proposals should go forward. There was no objection from the Commission.

Chairman Getman noted that the issue would be brought back to the Commission in February or March.

Commissioner Swanson noted that she would not be in favor of "immunity" unless the Commission has the final word on it.

**Item #5. Pre-Adoption Discussion: Materiality Standards for Real Property Economic Interests--Regulations 18704.2 and 18705.2 (Conflicts Project, Phase 2, Project D).**

Mr. Wallace explained that the staff memorandum reflects the decisions previously made by the Commission, and presents one issue and options to address it. The issue, he stated, revolves around the fifth step of the conflict of interest analysis.

Mr. Wallace requested confirmation from the Commission that the proposed amendment to Regulation 18705.2, treating leaseholds exactly like other real property with respect to the "direct effect" analysis, accurately reflected the decisions made by the Commission with respect to leaseholds.

Chairman Getman stated that she would be in favor of reconsidering the issue, noting that there may be situations where leaseholds should not be treated the same as an ownership. She suggested that staff develop a new proposal.

Mr. Wallace responded that staff would be able to provide new language proposals at the November meeting.

There was no objection from the Commission.

Commissioner Scott requested that additional examples be provided with the next amendment proposal, showing how different standards would apply in a different situation.

Mr. Wallace explained that the Commission had decided to amend Regulation 18705.2 to eliminate one of the circles used to determine indirect effects on a public official's real property. The Commission decided that real property within 500 feet of a public official's real property was considered directly affected, but did not decide how to treat decisions affecting property more than 500 feet away from a public official's real property. Staff proposed three options, he explained, and noted that the overwhelming opinion has been in support of option "c," including the League of California Cities (with some minor modifications). Staff preferred option "b" or "c," he noted, because option "a" uses the term "material" but leaves it undefined, thereby making the process more difficult because there will be differences of opinion as to whether a financial effect is considered material. Option "b," he added, sets dollar thresholds which are broadly disliked, and option "c" sets out factual situations.

Commissioner Makel stated that she did not like the dollar thresholds, and liked option "c."

Chairman Getman stated that option "c" may inadvertently make a tougher standard because there was no "safety valve" allowing a public official to vote when the effect on the public official's real property is the same as the effect on the public.

Mr. Wallace agreed, noting that his review of the meeting transcripts indicated that most public comment was against the exception.

Chairman Getman added that a public official could participate under the "public generally" exception if there was a substantially similar effect on the entire jurisdiction.

Commissioner Makel questioned whether that might be the right result.

Chairman Getman explained that her understanding of the Commission's intent was to have a 500 foot range within which a conflict was presumed to exist. Beyond the 500 foot range, she added, participation would be allowed unless something about the decision makes the public official's property "stick out like a sore thumb." She did not believe the proposed options provided that "sore thumb" effect, and suggested that more people would be disqualified.

Commissioner Scott questioned whether there could be an approach that would make the process easier, even though it would result in difficult decisions being presented to the Commission.

Chairman Getman responded that the proposal would be simpler, but would have the effect of being much tougher and disqualifying more people.

Ms. Wooldridge noted that the proposed amendments were a big improvement over the regulations. She agreed that the proposal would be tougher.

Mr. Wallace noted that the League of California Cities identified that it could be stricter, and suggested language modifications that lessened the severity of the charge. They were

also opposed to the complexity of the exception, he added. Mr. Wallace suggested that it might be better dealt with in the "public generally" exception.

Commissioner Deaver observed that the issue will be left up to Technical Assistance and Enforcement Divisions, and expressed his concern that the regulations will discourage members of the public from participating.

Commissioner Swanson agreed.

Mr. Martello noted that the "10 properties or 25%" criteria did not affect the public officials, and that the "public generally" rule was used instead to determine whether the public official could participate. He stated that the word "substantial" was important in the language, and that he supported the protections offered in the amendments and would rather return to the Commission to "tweak" the regulations if it disqualifies too many people. He supported option "c" with one minor change.

Mr. Martello suggested that the wording could be changed to, "substantial change in the character of the neighborhood including substantial effect on traffic."

Commissioner Scott questioned whether traffic is material enough to disqualify a public official.

Mr. Wallace explained that if traffic is affected, it would affect the fair market value of a house.

Commissioner Scott observed that a public official could be bothered by a proposal for reasons other than the fact that it would affect the fair market value of the property.

Commissioner Deaver noted that the airport board in his city was made up of pilots, and that it was important to have people on the board who know something about airports. Every time they vote, he observed, they benefit themselves, but they also benefit the community. He explained that people should not be discouraged from participating, and that people who know something about the issues should be encouraged to participate. He pointed out that the only people who know about planning and zoning are the real estate business persons.

Commissioner Swanson noted that a business person could gain a lot by voting on some issues.

Mr. Wallace pointed out that the business person may be able to participate despite the conflict if the "public generally" exception applies. He agreed that every scenario will be handled differently, and that it is impossible to draft regulations that deal with every circumstance. The question, he stated, was where to draw the line. He noted that the Phase 2 projects will be coming back to the Commission after adoption for further review and potential amendments.

Chairman Getman suggested that the Commission adopt option "c," with the addition of the word "substantial," to clarify the intent of the Commission that the financial effect on the public official must be specific and substantial.

There was no objection from the Commission.

Mr. Wallace stated that the proposal would be brought back to the Commission in November.

Ms. Wooldridge clarified that staff would be treating leaseholds unlike ownership of real property, but dealing with long-term leasehold interests more like ownership of real property.

Enforcement Division Chief Cy Rickards cautioned that the placement of the word "substantial" could require that numbers be considered, and urged that the Commission listen to the people who are regulated to find language that will achieve clarity. He agreed that the proposed amendment could result in stricter rules, but noted that situations where the rules might have to be interpreted more strictly may not occur very often. Enforcement Division drafted option "c", he stated, and added that it would allow easier enforcement. He noted that both Enforcement Division and the regulated community agreed that it would be better to remove the dollar amounts from the regulation.

Ms. Menchaca agreed with Mr. Rickard's concern about the placement of the word "substantial," and stated that the factors that trigger the analysis needed to be clarified.

Chairman Getman clarified that staff would amend language regarding leaseholds and consideration of adding the word "substantial" in option "c," and return to the Commission with their proposals in November, 2000.

Chairman Getman adjourned the meeting for a break at 10:35 a.m. The meeting reconvened at 10:55 a.m.

**Item #8. Pre-Notice Discussion: Manner of Disqualification (Conflicts Project, Phase 2, Project M); Legally Required Participation (Conflicts Project, Phase 2, Project Q).**

Staff Counsel Deborah Allison presented these projects, noting that Project M had been tabled earlier in the year when it was discovered that some of its issues overlapped with issues in Project Q. Both projects deal with disclosure requirements when an official has a conflict, she stated. Project M, Ms. Allison noted, deals with the disclosures an official must make when the official abstains from making a governmental decision, and Project Q deals with the disclosures an official must make when participating under the "legally required participation" exemption in a governmental decision.

Project M, Ms. Allison explained, deals with Regulations 18702.1(a)(5), which applies when an official is making a governmental decision, and 18730(b)(10), which applies to designated employees. She noted that 18702.1(a)(5) applies in a public meeting, and

18730(b)(10) applies when a designated official abstains from making a governmental decision because of a conflict.

Ms. Allison explained that the Commission needed to determine whether the disclosures should be mandatory, permissive, or deleted altogether. She noted that the Regulation file gave no information regarding the original purposes for requiring the disclosures. She enumerated some concerns raised by the public, including the need to determine what economic interest triggers a conflict to ensure that public officials are not using the Act in order to avoid participating, and the public's right to know.

Ms. Allison pointed out that the information is reported on the public official's Statement of Economic Interest (SEI), and that if the public official reports the information on the SEI and abstains from participation, they are in full compliance with the Act.

Ms. Allison noted that city attorneys pointed out the difficulties of a mandatory rule, but that there was unanimous support for a permissive rule that would encourage, but not require, disclosure. Public input indicated that most public officials will make the disclosure, she suggested. Ms. Allison stated that the Commission should determine how the disclosure should look, and whether the disclosure should be in the minutes or in writing.

Ms. Allison recommended that the Commission adopt a permissive rule.

Commissioner Swanson stated that she supported a permissive rule, because it would give the public official the opportunity to choose whether to disclose matters of a personal nature.

Commissioner Scott supported the mandatory rule, noting that most people do not see the SEI and do not know what the conflict is. She noted that if the public official discloses the conflict, it might be learned that there was not a conflict. She stated that disclosure might affect the decision and that the public has a right to know why the public official has a conflict. If the public official wants to abstain, she added, they can abstain. If a public official abstains because of a conflict, she noted, disclosure should be mandatory.

Commissioner Swanson stated that the public could ask the public official to explain the conflict.

Commissioner Scott responded that the public official could refuse, and that a vote by the public official on an issue will not be changed later if the public official is not reelected.

Commissioner Deaver noted that he had never heard anyone ask what the nature of a conflict was at a public meeting. He did not think that disclosure should be mandatory.

Commissioner Scott stated that mandatory disclosure is required in corporations and nonprofits, and that a public official should be held to the same standard.

Commissioner Makel responded that disclosure is preferable, but that the question is whether that disclosure should be required under the Political Reform Act. She supported the permissive rule.

Mr. Martello stated that he was concerned that there would be more regulations requiring that the public official step down. He explained that the real problem is that the public official may not know if there is a conflict, and that many of them will not participate because they may have a conflict. He believed that most people will explain the conflict when they do not participate because of a conflict.

Commissioner Deaver congratulated Ms. Allison on her new job. The Commissioners joined in thanking her for her work at the FPPC.

Chairman Getman stated that she was concerned that some public officials use the Political Reform Act to avoid voting on a contentious issue, but that she was also concerned about having enforcement actions against public officials who do not participate, but fail to disclose the conflict in the particular manner the Commission may choose. She added that it would be an inappropriate use of the agency's authority. She would rather see the agency focus on making sure that public officials with a conflict not vote, and that public officials who vote despite a conflict be required to disclose that conflict. She did not support a mandatory rule, and was not sure that a permissive rule belonged in a regulation.

Ms. Allison noted that many persons thought the permissive rule would be a good idea because officials often want to disclose and the permissive rule would encourage it. She suggested that it might be accomplished by a note to the rule.

Commissioner Deaver questioned why the Commission should encourage disclosure. If disclosure is not required, he stated, the encouragement would come from politics.

Commissioner Swanson moved that Regulation 18702.1 and 18730(b)(10) be made permissive. Commissioner Deaver seconded the motion. Commissioner Scott voted no. Commissioners Deaver, Makel and Swanson and Chairman Getman voted aye. The motion carried by a 4-1 vote.

Ms. Allison explained that staff was recommending language for the Commission to consider if they wanted to codify answers to questions that staff answers often, regarding rules governing the conduct of public officials when the official abstains from participating because of a conflict.

Ms. Allison stated that the first question was whether an abstaining official can attend or obtain materials from a closed session of a meeting of a public agency. She noted that the FPPC has embraced the court ruling in the *Los Gatos* opinion that the official who has a conflict cannot attend the closed session.

The second question, Ms. Allison continued, was whether the abstaining public officials can remain in their designated seat, or in the meeting at all, during deliberations, and whether they can be counted for purposes of achieving a quorum. Staff has advised



officials that they may remain in the meeting, but that they cannot be counted for purposes of achieving a quorum. She explained that the League of California Cities requested that language be included in the regulation stating that the regulations do not prohibit local jurisdictions from having rules that require a disqualified official to step down or leave the chambers.

Mr. Martello suggested that the language be worded, "Nothing in this Section shall be construed to prohibit an agency by local rule or the custom from requiring a disqualified member to step down from the dais and/or leave the chambers,"

Commissioner Makel clarified that FPPC advice has always been to allow the public official to remain in their designated seat.

Commissioner Deaver noted that he has seen people step down.

Commissioner Makel stated that the FPPC should leave the rule allowing the official to remain in the designated seat, which would allow local jurisdictions to have a different rule.

Commissioner Deaver suggested that the FPPC should make a rule requiring that the public official step down.

Commissioner Scott agreed that the public official should step down from the dais.

Tom Haas, City Attorney of Walnut Creek, representing the League of California Cities, noted that many agendas have numerous items on the consent calendar, and that requiring public officials to leave the room would substantially lengthen the meeting.

Commissioner Deaver stated that Mr. Haas made a good point.

Ms. Menchaca requested a clarification to the League of California Cities' proposed language. She stated that the proposed language could be construed as authority for local rules, and suggested the addition of, "Nothing in this section shall be construed to prohibit or authorize ..." to make clear that the FPPC is neither requiring nor prohibiting local agencies from adopting their own rules.

Ms. Allison noted that staff was also recommending that 18702.1 include a cross-reference to Regulation 18702.4, which would tell an official that they can represent their own interests if they appear in the same manner as any other member of the general public before their own agency.

There was no objection from the Commission to approving staff's recommendations on decision #2.

Ms. Allison presented Project Q, noting that the Los Angeles City Attorney's Office requested this project. She explained the *Kunec* decision required disclosures but did not fully define how those disclosures should be made.

There was no objection from the Commission to clarifying the disclosure requirements.

Ms. Allison explained that staff's proposed language attempted to give the public official all the information they would need to specify for the meeting record. That language, she noted, did not precisely match the requirements for what must be disclosed on the Statement of Economic Interest (SEI). She proposed that the Commission could instead consider requiring a level of specificity that would be at least equal to disclosure of financial interests on the SEI. This would, she explained, provide a larger body of law and advice to draw from for officials to use for guidance. Because it is a larger body of law, she noted, it may be easier for an official to miss a category and fail to make full disclosure.

Commissioner Deaver noted that the League of California Cities objected to the use of the word "particularity" in the proposed language, and agreed with that objection.

Chairman Getman liked the idea of tying it to the SEI because everyone is used to it and because it makes sense to tie it to that level of disclosure. She noted, however, that a conflict arising from a personal residence would not be disclosed on the SEI, therefore additional language would be required. Chairman Getman also noted that the description of the business activity was not required on the SEI either.

Commissioner Deaver suggested that the regulation refer to the SEI in addition to including the proposed language.

Ms. Allison suggested language reading, "To the level of specificity equal to the disclosures of financial interest listed on the annual Statement of Economic Interest, unless the conflict is created by property that is the official's principal or personal residence, in which case the official shall disclose that fact." In that way, she explained, the official would not have to disclose his address.

Commissioner Scott questioned whether that was the conflict, and suggested that the conflict is the effect on the personal residence, and noted that the SEI does not always require the information necessary to make the decision.

Ms. Allison responded that, to ascertain that information, the public official would have to disclose the interest, go through the eight step analysis, then disclose why "legally required" applies.

Commissioner Scott stated that the eight step analysis would help the public official determine whether they can participate, and suggested that, for purposes of the disclosure, the information should be less technical, but informs the public about the issue of the conflict.

Ms. Allison noted that, in the *Kunec* case, the court required that the public official provide more information, and that a common sense method that would give the public official confidence in their compliance with the regulations when they make their disclosures.

Chairman Getman stated that the current language does not require enough disclosure to be in compliance with the court requirements.

Ms. Allison responded that the court did require more than what was being disclosed, but did not make clear what else was expected.

Commissioner Scott stated that the public official should disclose a short description of the nature of the conflict and the personal financial interest that gives rise to the potential conflict.

Commissioner Makel discussed the *Roberti* opinion as an example.

Chairman Getman explained that the question was whether to state that there is an investment interest in a business, or whether to state that there is an investment interest in a business that could be potentially affected by the decision.

Commissioner Makel stated that the suggestion did not seem to add anything because it seemed obvious.

Commissioner Scott disagreed, stating that it would add something if the nature of the conflict was clear to the public.

Commissioner Makel stated that she had no problem with the concept, but that making the requirements clear would be difficult to implement.

Ms. Wooldridge stated that a standard should attempt to draw a connection between the financial disclosure and the potential conflict. She cautioned that the Commission should not set another standard that a public official may have to meet on pain of losing a court decision.

Ms. Allison suggested that staff prepare another proposal with amended language.

Chairman Getman asked the Commission if they wanted language that would tie the interest to the potential conflict, describing the nature of the conflict.

Commissioner Scott responded that she thought it was necessary.

Commissioner Makel stated that it was a good theory, but that she would want to see the language before deciding.

Commissioner Deaver agreed with Commissioner Makel. He did not believe that minute detail would be necessary.

Chairman Getman stated that she supported more detail in the disclosure, noting that some summary description of the potential conflict should be required because just disclosing the interest does not necessarily disclose the conflict. She expressed her concern that it be written in a way that would keep it simple and enforceable.

Chairman Getman suggested that staff return with amended language in November.

Ms. Allison noted that the League of California Cities has suggested the word, "adjournment" be changed to "recess," in Section 18708(b)(3).

Commissioner Deaver recommended that the Commission follow that suggestion.

Chairman Getman added that it should be clarified to include a conflict or a potential conflict.

Ms. Allison reported that the League of California Cities requested that the language make clear that either the public official or another officer or employee of the agency could disclose the legal basis, because sometimes the attorney understands better the reason why the interest is being disclosed.

There was no objection to that suggestion.

Ms. Allison reported that the *Kunec* case seemed to understand that all of the disclosures needed to be made in the minutes. She noted that the proposed regulation tells the official to disclose the existence of the financial interest, but does not explicitly require that the disclosures describing the nature of the interest and the reason that there is no alternate source be on the official record. She added that there was still a question as to whether the disclosures be in the minutes or some alternative place.

Commissioner Scott suggested that, even if the disclosure is made in written form, the official should also have to disclose the conflict verbally at the meeting and that the disclosure should be kept in the minutes.

Chairman Getman noted that disclosure is also required for negotiations, which would not be at a public meeting, and that there should still be some kind of public record.

Ms. Allison responded that the public official's disclosure may not be written in the minutes, even though the official made the disclosure.

Commissioner Scott stated that the person recording the minutes should be required to enter the information in the minutes.

Chairman Getman suggested that the proposed language would require that the disclosure be in the minutes or, in the case where there are no minutes, a public record would be created by the requirement of a written disclosure.

Ms. Allison clarified that this issue could occur in situations like the *Brown* case, as well as when an official obligates the agency to a contract.

Commissioner Deaver suggested that the disclosure could be made at a subsequent meeting.

Chairman Getman noted that it would require that the item then be agendaized.

Ms. Allison noted that the disclosure would then be made after the decision was made.

Commissioner Scott suggested that option A add the wording, "...or other meeting or discussion," be added to the sentence in proposed section 18708 (b)(3), establishing that a new document be kept with the minutes stating disclosures. She voiced her concern that there should be a mechanism that the public can search for that is kept as part of an official public record.

Chairman Getman suggested that the language read, "The disclosures shall be made before the official makes or participates in making the decision. The disclosure shall be made orally at the open session of the next public meeting of the agency or before recess to closed session of the next public meeting, and shall be memorialized in the minutes of the meeting or in a writing either before or within three working days after the participation and kept by the agency as a public record." This, she noted, would require disclosure for negotiations. The idea, she stated, was to put something in writing and connect it to a public meeting.

Ms. Wooldridge noted that they should also deal with situations where a public official is making decisions that are not tied to a public meeting.

There was no objection from the Commission.

Ms. Allison explained that the next decision was whether to incorporate the *Hudson* opinion in a regulation, providing that the smallest number of public officials necessary should participate.

There was no objection from the Commission.

Ms. Allison explained the next decision, to consider whether the preferred method of selection be by lot or other means of random selection.

Chairman Getman clarified that it would be the preferred, but not required, means of selection.

Ms. Allison responded affirmatively, and noted that it would allow agencies to have a means of selection that would allow the official with an indirect interest to participate instead of allowing the official with a direct interest. Some argue, she noted, that the selection should be random.

Mr. Martello stated that a 1090 problem could complicate random selection. The preferred method was to avoid ascertaining degrees of conflict, and suggested a little flexibility.

Chairman Getman suggested that the language referring to the random method of selection be changed to, "may be used" instead of, "must be used."

There was no objection from the Commission.

Ms. Allison noted that staff has advised that once an agency has determined which official will participate, that official is selected for the duration of the proceedings, and that they have added language to the regulation that adopts that rule.

Commissioner Deaver stated that he supported that idea.

There was no objection from the Commission.

**Item #3. Approval of Regulation Calendar for the Year 2001.**

Ms. Menchaca presented the proposed regulation calendar for the year 2001 for the Commission's consideration and for public input. She explained that the development of the calendar was an informal process that considered the priorities of the various divisions of the Commission, and reflected concerns of the Commission.

Ms. Menchaca explained that the proposed calendar includes a status memo in October of 2001, to review the status of Phase 2. She asked whether the Commission wanted staff to revisit the *Fontana* opinion issues, dealing with prequalification disclosure issues with respect to LAFCO proceedings.

Government Relations Director Mark Krausse stated that AB 2838 was passed and signed by the governor, and would require that local agencies recapture contributions and expenditures made during the prequalifying period once a proposal has been placed on the ballot. He noted that some parts of the bill will need to be amended in legislation next year, and that the Commission should decide whether it is appropriate to look at the regulations now, or wait until after the LAFCO's have had the opportunity to comply with the new procedures required under AB 2838.

Chairman Getman noted that it would benefit the Commission to hear from the LAFCO's before deciding on regulations in this area.

Ms. Menchaca stated that staff proposed a working group meeting in March, 2001, and possible prenotice discussion in May, 2001. She noted that she had spoken to LeAnn Pelham, of the LA Ethics Commission, and that they thought that May, 2001 would be a good time to review the LAFCO feedback. She asked the Commission whether they wanted to work on this as a separate project or combine it with campaign reporting project.

Chairman Getman requested a status report in May, 2001, advising the Commission about the status of the LAFCO's that went through the process, identifying problems and presenting options dealing with the issues.

There was no objection from the Commission.

Ms. Menchaca requested that the Commission also consider in the 2001 calendar, including the permanent ban revolving door regulation and whether the Commission

should consider specific changes to the mass mailing regulation or look at the regulation as a whole. She noted that the areas of major concern were outlined in the staff memo.

There was no objection to looking at the permanent ban issues from the Commission.

Chairman Getman explained that a formal vote needed to be taken on the mass mailing issue because a formal rulemaking proposal is pending before the Commission from CalPERS. She understood from staff that looking at this issue could open a "Pandora's Box" and that staff recommended against doing that.

Ms. Menchaca agreed.

Ms. Wooldridge explained the CalPERS request that the mass mailing regulation be amended to allow them to be able to include in a mass mailing a photograph of the CalPERS Board of Administration as a part of any of their mass mailings. She noted that CalPERS has also suggested that the amendment should apply to all boards, bodies, commissions, councils, etc. The issue, she stated, is that the request was made to the FPPC on March 21, 2000, and under the 1974 APA the Commission has thirty days in which to respond by either denying the request or setting the matter for hearing. Ms. Wooldridge explained that the deadline has been extended several times and that the Commission now has until Oct. 17, 2000 to respond. She noted that CalPERS has not submitted additional evidence or other support for the proposed change.

Ms. Wooldridge stated that staff recommends denial of the request from CalPERS because CalPERS has not identified any constitutional or other serious infirmity with the regulation requiring immediate remedy; it has not identified any irregularity in the adoption process for the regulation; it has not alleged that it has suffered any hardship caused by the regulation; and it has not alleged that it is somehow treated differently from others who are similarly situated. Additionally, she noted that the history of the regulation suggests that an attempt to narrow the discussion of a regulation to just one finite portion of the mass mailing restriction would open a "Pandora's Box" and the Commission might not be able to keep it on that issue. She also indicated that a review at this time would present a sizeable demand on staff, and that agency resources may be burdened significantly as the election nears. Lastly, she noted that both Houses of the Legislature have urged the Commission not to amend its regulatory calendar to include a review of the mass mailing rules.

Lance Olson, appearing on behalf of the Legislature, stated that the CalPERS request should be denied and that there is no need to consider the mass mailings issue on the regulatory calendar for 2001. He added that the CalPERS request for the group photo is a concern because the FPPC has penalized agencies that have violated the regulation, and if the Commission were to change the regulation it would be unfair to those who have paid the price for following the regulation.

Commissioner Swanson moved that the Commission accept the staff's recommendation to deny the CalPERS request. The motion was seconded by Commissioner Deaver and passed unanimously.

Ms. Wooldridge reported that staff would prepare a letter from the Commission to CalPERS before October 17, 2000.

Since there were no other issues on the adoption of the 2001 calendar, Ms. Menchaca stated that staff would bring it back in November 2000 for formal adoption.

The Commission recessed to closed session at 12:15 p.m. to consider the following items:

**Item #20. Pending Litigation (Gov't. Code §§ 11126 (e)(1), 11126 (e)(2)(C).)**

- a. *Jerry Brown v. Fair Political Practices Commission.*
- b. *California ProLife Council PAC v. Karen Getman et al.*
- c. *Kenneth Kao, et al. v. Karen Getman.*

**Item #21. Discussion of Personnel. (Gov.Code § 11126(a)(1).)**

Chairman Getman reconvened the meeting in open session at 1:39 p.m.

**Item #6. Pre-Adoption Discussion: Materiality Standards for Business Entities: Repeal and Re-enact Regulation 18705.1 (Conflicts Project, Phase 2, Project A).**

Senior Commission Counsel John W. Wallace explained that most of the major decisions regarding amendments to this regulation have already been made, and that he was now presenting proposed technical changes.

The first change, he explained, was whether to use the Generally Accepted Accounting Principles (GAAP) to guide definitions in the regulation. Staff's view, he noted, was that GAAP tended to be relatively universally known, and that if the terms in the regulations were going to be defined, they should be consistent with and controlled by GAAP.

There was no objection to using GAAP from the Commission.

Commissioner Scott stated that the staff memo notes that there are alternative, usually exclusive, definitions of assets, and that there are many types of assets. She did not want definitions that would exclude assets that may not exist yet. She suggested that someone look at the Law Revision Commission's review of the Uniform Commercial Code (UCC) addressing the issues, to ensure that the Commission is consistent with that. She requested that any inconsistencies be brought back to the Commission for further discussion.

Mr. Wallace agreed, and questioned whether the Commission wanted to choose options at this time and have staff report back with inconsistencies at the November 2000 meeting.



Ms. Wooldridge noted that GAAP standards change over time to capture what is occurring in markets. She agreed that staff could come back to the Commission with any inconsistencies.

Mr. Wallace noted that the first decision point in the staff memo included a staff recommendation to defer to GAAP rules, but also includes general definitions in the regulations.

There was no objection to accepting the staff recommendation for decision point one.

Mr. Wallace explained that decision 2, option (d) included language consistent with current GAAP language, and also has language dealing with the *Galligan* case issues. He noted that staff did not believe that language was necessary, but that if the Commission wanted language to resolve the issue, subdivision (A) was recommended by staff.

Commissioner Scott stated that there may be scenarios where an interest in real property is one where an official does not own the property, and that it may need to be addressed outside of this regulation.

Mr. Wallace agreed, noting that staff had included safeguards in the language. One safeguard, he explained, is that if the note is affected there would be materiality. He added that if foreclosure proceedings are started it will be considered a current interest in an asset, even though it may be a little different from what GAAP would provide, but for avoiding conflict of interest situations it made sense.

Chairman Getman asked if there was any objection from the Commission to accepting the staff recommendation to adopt option (d) on assets, with the understanding that staff will also look at what the Law Review Commission is doing on this issue.

There was no objection from the Commission.

Mr. Wallace explained that decision 3 asked whether the Commission would define other terms, deferring to GAAP.

There was no objection from the Commission.

Mr. Wallace presented new language in decision 4 for consideration by the Commission, guiding public officials to rely on financial statements that have been independently audited, and requiring certain assurances that the financial statements are current and accurate. He noted that additional feedback after this meeting may require later revisions to the language, and that it will be brought back to the Commission for consideration in December 2000.

There was no objection to proceeding tentatively with this approach.

**Item #7. Pre-Notice Discussion: Amended Regulation 18701 (Conflicts Project, Phase 2, Projects O and P).**

Staff Counsel Julia Bilaver presented proposed changes to Regulation 18701, explaining that both Projects O and P deal with the definition of public official. She explained that the regulation interprets one statute that defines "public official" for conflict of interest purposes, and two statutes that deal with who must file SEI's and what they must disclose.

Ms. Bilaver explained that the first proposed amendment would delete all introductory language in subdivision (a) because there is no substantive language in that subdivision.

There was no objection from the Commission to that deletion.

Ms. Bilaver stated that the proposed regulation would add "committee" to 18701(a)(1), because many local jurisdictions have citizen advisory committees and, if those committees have decision-making authority they should be subject to the Act.

Commissioner Swanson expressed her concern that the addition might circumvent public participation on different committees.

Ms. Bilaver responded that the regulation currently provides that the committee would have to have been in existence for awhile and have made several recommendations that have been approved over a significant amount of time. She stated that the intent is not to change what the regulation already provides, but to add the word "committee" because "board" and "commission" does not accurately describe committees that are sometimes formed by local jurisdictions.

Ms. Menchaca noted that current advice given to members of committees, if they meet any other criteria, is that they would fall under the provisions of Regulation 18701, and that this would not substantively change or expand the law.

Commissioner Swanson stated that it is important that Commission decisions do not circumvent the general public's participation in their government, and that she did not support rules that would preclude the public from participating in some manner to help government make decisions.

There was no objection from the Commission to that addition.

Ms. Bilaver explained that consultants are independent contractors who make certain governmental decisions or who participate in making certain governmental decisions over a significant period of time. She noted that some independent contractors are not currently covered by that definition and that staff was presenting this proposed change because the regulation has been construed to be too narrow.

Ms. Bilaver stated that the definition had been reviewed over a two-year period, concluding in 1994, and that staff concluded that the implementation of the 1994 decisions has been working. She explained that those people who should be covered are covered, and that the regulated community's comments from that period indicated that a broader definition was unworkable. She recommended that expansion of the definition

not be done, but did recommend a clarifying change, adding "or should be specified" to Regulation 18701(a)(2)(B).

Chairman Getman expressed her concern that the proposal did not indicate who would meet that specification.

Ms. Bilaver explained that this would apply when a local code has not been updated when a new position is created and an independent contractor is hired for that position and will participate in making decisions in that position.

Chairman Getman asked how a person would know that they have reporting obligations under the conflict of interest laws. She noted that if the position is not in the conflict of interest code, and it is not included in the contract, the person would not know about their obligations. She was concerned that an enforcement action could be brought in those types of situations.

Commissioner Deaver agreed with the general concept of the proposal, noting that without it, agencies could hire contractors to get around the conflict of interest laws. He suggested that the Commission could publicize the change so that people will know to amend their codes.

Ms. Bilaver noted that this would ensure that independent contractors are covered by the provisions of the conflict of interest code even though they are hired by agencies who are not complying with the Act by updating their conflict of interest code.

Commissioner Deaver suggested that the agency be required to advise the contractor at the point in time when the contractor becomes a full-time employee.

Chairman Getman agreed, but noted that the language of the proposal would require a person who is hired to do a completely new line of work be covered by the conflict of interest code, even though it is not determined until later that the position should be covered by the code.

Commissioner Deaver suggested that those situations could be covered through enforcement discretion.

Ms. Bilaver stated that all consultants and employees are covered under disqualification, and that consultants get disclosure and disqualification duties at the same time. She added that there is no way to put people on notice of their reporting obligations unless the agency puts the consultant in their conflict of interest code at the time the consultant is hired.

Ms. Menchaca noted that advice letters refer to Government Code 87302, which states that the position should be enumerated in the conflict of interest code if the person is making or participating in governmental decisions, and advise the person to ask their agency to check to see if they are in compliance with the statute. She explained that, other than state filing officers, the Commission does not have the right to tell an agency to put someone in their conflict of interest code.

Chairman Getman questioned how the Commission could have the right to tell someone that they should have been included in the conflict of interest code, if the Commission cannot require that a person be included in the conflict of interest code.

Ms. Menchaca agreed that it was a difficult issue, noting that both the person and the agency could need guidance if they do not understand how to interpret the regulations. Staff tries to provide that guidance. She suggested that the key to this regulation would be to put people on notice that the legal requirement is in Government Code 87302.

Ms. Wooldridge clarified that wherever the Commission is the code reviewing body, they have the right to review, amend, and advise someone of what should be in their code. She agreed that the Commission is the code reviewing body for multi-county agencies, but is not the code reviewing body for all local agencies.

Chairman Getman suggested that the Commission look at the local conflict of interest codes.

Ms. Wooldridge suggested that Government Code § 87306 be referenced.

Mr. Haas noted that the Commission or any person can sue the local agency if it fails to designate a person who should be designated. If a city does not make that designation, and a person makes decisions on issues in which they have an economic interest, Mr. Haas noted, the person "skates," if the proposed language is not adopted.

Chairman Getman pointed out that the person "skated" because the city failed to include them in the conflict of interest code, as they are required to do. She did not believe it was fair to punish the person who was not informed of their reporting obligations.

Mr. Haas responded that everyone is on notice that they cannot make a decision that involves that person's financial interest. He explained that, under the FPPC's definition of "consultant," every consultant who works for a public agency is under an obligation not to make a decision that involved their financial interest.

Ben Davidian, from Bell, McAndrews, Hiltachk and Davidian, agreed that the language should not include, "or should be specified," because it could result in an enforcement case against someone who made a purely innocent error. He noted that the issue rarely occurred and did not warrant the regulation.

Commissioner Scott responded that there had been enforcement cases involving this issue. She was concerned that, if the Commission did not adopt the language, a loophole would be created that would allow an agency to hire anyone as a consultant and that consultant would not have the reporting obligations that they otherwise would have had.

Commissioner Makel pointed out that this would not apply to those situations where the person was an employee and already specified in the code.

Mr. Davidian pointed out that there are people who would bring the issue to the attention of the agency and that it was not likely that it would become a problem. He questioned why the consultant should be punished if they have no idea that they have a filing obligation.

Commissioner Scott stated that contractors are supposed to know about federal laws that they have to comply with.

Mr. Davidian stated that the Commission would be taking away the consultant's obligation to know, and would be exposing the contractor to an enforcement action when the contractor had no idea that there was a reporting requirement.

Commissioner Scott suggested that agencies be educated about the requirement.

Mr. Davidian stated that the FPPC did not have the personnel to educate people about all the rules.

Ms. Wooldridge noted that, currently, an enforcement action could be taken against an agency if a staff person has acted in a decision and is not specified in the code but should have been.

Commissioner Makel stated that the employee should be treated in the same manner as the consultant, and that if an action cannot be taken against an employee, then it should not be any different for the consultant.

Chairman Getman suggested that the resolution lies in making sure that agencies update their conflict of interest codes.

Commissioner Deaver stated that ignorance of the law is not a good defense.

Mr. Rickards stated that enforcement actions would not be taken against someone for not filing if they are not designated to file, but enforcement actions would be taken against someone who participates and has a conflict.

Chairman Getman explained that people who have an obligation under the conflicts law are public officials, and noted that the question rests with who is considered a public official. She did not agree that a person who is not designated in the conflicts code should be subject to enforcement actions. She also questioned who would make the decision that the person should have been designated in the code.

Ms. Wooldridge proposed that staff rewrite the proposal, and that staff further analyze the issues in the staff memo.

Commissioner Deaver stated that he supported the language proposed by staff.

Chairman Getman explained that she was concerned with the way the FPPC deals with local conflict of interest codes, noting that it is a flaw in the way the statutory scheme works. She added that the FPPC provides guidance, but cannot tell the local agencies

who to designate in their conflict of interest codes. However, she stated, the FPPC will have to decide whether to enforce it against someone who should have been included in the code but the local agency left them out. She noted that the Commission does not review every conflicts code but does enforce them.

Ms. Bilaver presented the proposal to restructure the definition of "other public officials who manage public investments." She explained that the regulation does not reflect the *Siegel* Opinion, and that the proposed language would reference that opinion so that people who are dealing with a nonprofit will know that they should look at that opinion for guidance.

There was no objection from the Commission to the restructuring of the definition and the referencing to the *Siegel* opinion.

Commissioner Swanson noted that she was prepared to vote on the definition of "consultant," but was willing to wait until the next meeting if the staff wanted to prepare amended language considering the Commissioners' discussion.

Ms. Wooldridge responded that it would be helpful to know the Commissioner's ideas and to bring back another proposal.

### **Enforcement Matters - Action Items**

Chairman Getman thanked Investigator Don McCormick for his many years of outstanding work with the FPPC, noting that the FPPC was unable to pay investigators like Mr. McCormick what they deserved, and that another agency was promoting Mr. McCormick.

Commissioner Scott requested that discussion of Enforcement actions be included on the agenda for the next Commission closed session meeting.

Chairman Getman recused herself from any consideration of item 11, due to prior work that she did.

Mr. Rickards clarified the format on the streamline procedures exhibit pages for late contribution stipulations, explaining that the third column "number" is an element of the Secretary of State's database, and implies either the district or the proposition number the case is related to.

Commissioner Deaver motioned that items #9, #12, #13, #14, and #15, be adopted on the consent calendar. Commissioner Swanson seconded the motion. There being no objection, the following items were approved:

#### **Item #9. Failure to Timely File Late Contribution Reports – Streamlined Procedure.**

- a. *In the Matter of California Cement Promotion Council, FPPC No. 2000-396.* (1 count).**

- b. *In the Matter of Padilla & Associates, FPPC No. 2000-470.* (1 count).
- c. *In the Matter of John D. & Marcia Goldman, FPPC No. 2000-484.* (1 count).
- d. *In the Matter of Christine Russell, FPPC No. 2000-397.* (2 counts).
- e. *In the Matter of Venture Catalyst Incorporated, FPPC No. 2000-418.* (1 count).

**Item #12.** *In the Matter of Maria Chacon, Ramiro Morales, Elizabeth Corona, and Committee to Re-elect Chacon and Morales, FPPC No. 99/246.* (5 counts).

**Item #13.** *In the matter of Donna Courtright, Donna Courtright for State Assembly #24, and Michael Erickson, treasurer, FPPC No. 98/202.* (6 counts).

**Item #14.** *In the Matter of Michael Erickson, FPPC No. 98/202.* (6 counts).

**Item #15.** *In the Matter of David Gerred and David Gerred for City Council, FPPC No. 99/635.* (6 counts).

**Item #10. Failure to Timely File Statements of Economic Interests - Expedited Procedure**

- a. *In the Matter of Mary Acevedo, FPPC No. 99/810.* (1 count).
- b. *In the Matter of John Lucak, FPPC No. 2000/523.* (1 count).
- c. *In the Matter of Michael Neil, FPPC No. 2000/383.* (1 count).

Mr. Rickards explained that all three of these cases pertained to failure to timely file statements of economic interests.

Commissioner Swanson motioned that all three stipulations be approved. Commissioner Deaver seconded the motion.

Chairman Getman noted that the *Neil* case concerned her because it illustrated that the conflict of interest code has become so expansive that government employment requires filing of an SEI and makes the employee subject to the conflict of interest rules. She stated that she did not think that it was the right use of FPPC resources. She recommended that staff review who should be designated in the local conflict of interest codes, who has the authority to decide who gets designated and whether agencies are designating appropriately.

Commissioner Deaver noted that Mr. Neil, as a lifeguard captain, should be treated the same as a police captain.

Mr. Rickards responded that the expedited SEI program does not contemplate a full investigation. He noted that if the Commission chooses to have enforcement staff investigate these cases more fully, then the expedited program would be invalidated. Mr. Rickards explained that this was the first enforcement referral for the respondent.

Mr. Rickards explained the streamlined process, noting that enforcement is working on getting their data system online for more efficient tracking of enforcement cases. Currently, he explained, staff searched files in the computer to identify those persons who have previous enforcement referrals in order to determine whether a case should be included in the streamlined process. He noted that persons who have a second enforcement referral should not be treated in the same way as those persons who have a first enforcement referral.

Mr. Rickards explained that enforcement staff keeps a list of those persons who have had previous SEI referrals.

There was no objection from the Commission to approving Items #10 a, b, and c.

**11. *In the Matter of Voter Revolt to Cut Insurance Rates and William Westermeyer, Treasurer, FPPC No. 98/333.* (1 count).**

Chairman Getman recused herself from this item at 2:40 p.m., and stepped down from the dais.

Commissioner Swanson stated that the individual donations in this case were very small, even though the total amount of contributions was large. She asked staff if other options were available other than fining.

Senior Staff Counsel Mark Soble responded that the Treasurer in this case was experienced and did not keep records related to over six-figures worth of the bulk of their expenditures, making it difficult for Franchise Tax Board to audit those expenditures. He noted that, even though there is no evidence to suggest that it was deliberate concealment, there were no records, and that it was possible that there were more violations that were not discovered.

Mr. Soble stated that the charges could have been more aggressive, covering more reporting periods, or the fines could have been lowered or eliminated, but noted that an experienced treasurer should have known the rules, even if the contributors did not.

Commissioner Swanson noted that most of the contributions were less than one hundred dollars, and that it was her understanding that they did not need reporting. She stated that the fine seemed severe since it was the maximum amount allowed.

Mr. Soble explained that the fine could have been higher, if enforcement had charged by reporting period, however, since there did not appear to be a deliberate concealment, enforcement staff chose to charge a single administrative count.

Commissioner Deaver stated that anyone who qualifies for a ballot measure is experienced, and that records must be kept in order to inform average people. He supported the proposed fine.

Commissioner Deaver motioned that the stipulation be accepted.



Commissioner Makel agreed.

Mr. Rickards agreed that the fine was appropriate, noting that, without adequate records, there was no way to know how the contributions were spent.

Commissioner Makel stated that there was no way to know that it was all small contributions.

Mr. Soble noted that, based on the records, staff was assuming that the contributions probably were small, but that it was difficult to verify because the appropriate records were not kept. He stated that record-keeping violations should be treated as one of the more serious violations, because if records are not kept, other possible violations could be concealed.

Commissioner Makel stated that the fine should be higher, but acknowledged that this was the highest fine staff could recommend. She seconded the motion to accept the fine.

Commissioners Deaver, Makel, Scott and Swanson voted "aye." The motion carried.

Chairman Getman returned to the dais at 2:55 p.m.

#### **Item #17. Legislative Report**

Government Relations Director Mark Krausse reported:

**SB 2076** was passed by the Legislature and signed by the Governor. Mr. Krausse commended Counsel Scott Tocher on his work with the bill;

**AB 2720** was signed by the Governor. This bill created the Internet Political Practices Commission, and charges the Chairman of the FPPC to make two appointments to the new commission;

**SB 1874** was vetoed by the governor because it did not provide enough time to implement and because the costs were excessive.

#### **Item #18. Litigation Report**

Chairman Getman stated that the Litigation Report would be taken under submission.

#### **Item #19. Executive Director's Report**

Executive Director Wayne Strumpfer reported that Jennifer Martello, Executive Fellow from California State University at Sacramento had been hired, and explained the hiring process. He stated that she will be working full-time for the Commission, while being paid by the university.

**Item #16. *In the Matter of Doug Anderson, FPPC No. 96/174.*** (4 counts).

Commissioner Makel motioned that the stipulation be approved. Commissioner Deaver seconded the motion.

Mr. Rickards explained that the proposed fines were based on the statute and the regulations, noting that a civil "revolving door" case permits a fine of \$2,000 per count. He stated that staff identified four counts that described the behavior and fit under the statute and the regulations. He added that staff recommended the maximum fine.

Senior Counsel Deanne Canar further explained how and why the counts were charged, noting that their investigation revealed four contacts or appearances at the Franchise Tax Board.

Commissioner Swanson called for the question.

There was no objection from the Commission to approving the stipulation.

Mr. Rickards noted that this case that took a tremendous amount of work by Ms. Canar, and commended her for the way she handled the case.

The meeting was adjourned at 3:00.

Dated: September 26, 2000

Respectfully submitted,

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Sandra A. Johnson  
Executive Secretary

Approved by:

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Chairman Getman